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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL PADILLA,

Defendant and Appellant.

B285989

(Los Angeles County
Super. Ct. No. YA094694)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mildred Escobedo, Judge. Conditionally reversed and remanded with directions.

Derek K. Kowata, under appointment by the Court of Appeal, for Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Kristen J. Inberg, Deputy Attorneys General, for Respondent.

Daniel Padilla appeals from his judgment of conviction of three counts of assault with a deadly weapon upon a peace officer (Pen. Code, § 245, subd. (c)).¹

Padilla first seeks reversal of a trial court order denying his motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) for discovery of complaints regarding three police officers (Salvador Garcia, Ryan Harrison, and Brian Weiss) who were involved in the incident that led to his conviction. We agree that Padilla met the low threshold showing of materiality needed to trigger a *Pitchess* review of the officers' personnel files for complaints regarding fabrication, falsification of reports, and excessive force, and we conditionally reverse and remand for this limited purpose.

Second, pursuant to Padilla's request, we conducted our own in camera review of the sealed *Pitchess* hearing conducted regarding the personnel records of another officer, Lieutenant Joseph Hoffman. We find the trial court did not abuse its discretion in concluding there was no discoverable information in his personnel file.

Third, Padilla contends the trial court abused its discretion in the way it responded to a question from the jury, but Padilla's trial counsel forfeited any objection by not only failing to object but also advocating for the response given by the court. We also reject Padilla's contention that his trial counsel's failure to object constituted ineffective assistance of counsel, as his counsel had valid tactical reasons for not objecting.

Finally, in accordance with our opinion in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), we grant Padilla's request

¹ All undesignated references to code provisions are to the Penal Code.

for an opportunity to request an ability to pay hearing in the trial court as to the restitution fine and court facilities and operations assessments imposed on Padilla.

We conditionally reverse and remand for the trial court to conduct an in camera review of the records of Officers Garcia, Harrison and Weiss. Further, on remand the trial court must allow Padilla to request a hearing and present evidence of his inability to pay the restitution fine and assessments that the court imposed. In all other respects we affirm.

PROCEDURAL AND FACTUAL BACKGROUND

On November 17, 2016, Padilla was charged in a six-count felony information with assault upon a peace officer (§ 245, subd. (c); counts 1-4), possession of a firearm by a felon (§ 29800, subd. (a)(1); count 5), and identify theft (§ 530.5, subd. (c)(2); count 6). As to all counts, it was further alleged Padilla served two prior prison terms for felonies (§ 667.5, subd. (b)). Padilla pled not guilty. The People subsequently dismissed counts 5 and 6.

Count 1 alleged Padilla assaulted City of Redondo Beach Police Officer Joshua Spry with a deadly weapon, specifically, Padilla's vehicle, on July 21, 2016. Counts 2, 3 and 4 also alleged assault with a deadly weapon (again, the vehicle being driven by Padilla) against Lieutenant Hoffman, Officer Garcia and Officer Harrison, respectively, in a separate incident on August 2, 2016.

Padilla brought a *Pitchess* motion for discovery of personnel records of Officer Spry, Lieutenant Hoffman, Officer Garcia, and Officer Harrison, the four alleged victims of the assaults, as well as Officer Weiss and Sergeant Michael Strosnider, who were also

involved in the incident on August 2, 2016. The People opposed the motion, arguing Padilla had failed to satisfy the good cause and materiality requirements necessary to trigger in camera review of these officers' files. The court granted the motion as to discovery of complaints of "fabrication, falsification of reports, or excessive force" by Sergeant Strosnider, Lieutenant Hoffman, and Officer Spry, but denied the motion entirely as to the personnel files of Officers Garcia, Harrison and Weiss.

Because Padilla's appeal does not concern the sufficiency of the evidence to support the convictions, we only briefly summarize the evidence admitted at the 13-day jury trial.

On July 21, 2016, Sergeant Strosnider and Officer Spry were at the Manor Motel in Hawthorne for a probation search of a third party, Kelly Kimbell. They found bullets, a magazine, counterfeit money, and methamphetamine in the motel room. Kimbell said the bullets belonged to Padilla.

While the search was ongoing, Padilla drove into the parking lot, and Kimbell yelled for him to leave. Sergeant Strosnider directed Officer Spry to detain Padilla's car.

Officer Spry approached the vehicle, identified himself as a police officer, and directed Padilla to put his car in "park" or turn it off. Instead, Padilla reversed out of the parking spot, requiring Officer Spry to move to avoid being hit by the car. Officer Spry drew his firearm and pointed it inside the car, and repeatedly ordered Padilla to stop the car, but Padilla continued backing out of the space and then exited the parking lot at a high rate of speed, requiring Officer Spry again to move out of the way so that the car did not hit him. Padilla sped away quickly, and Officer Spry lost sight of his vehicle.

Kimbell told Sergeant Strosnider that Padilla had a gun; he was “crazy”; he “lives in a constant state of paranoia”; he “drives recklessly wherever he goes”; and “he’ll shoot it out” with the police “because this is a game to him.”

Sergeant Strosnider learned Padilla had an outstanding no-bail felony warrant for unlawful possession of a firearm. Using Padilla’s cell phone number that Kimbell provided, Sergeant Strosnider was able to obtain a search warrant to track the phone’s location. Kimbell also told him that Padilla would be in room 227 of the Best Western Hotel in Lawndale on August 2, 2016 and would be driving a black Chevrolet Tahoe or Yukon.

Based on this information, Sergeant Strosnider formulated a plan to arrest Padilla with the assistance of the Directed Enforcement Unit (DEU), a Redondo Beach Police Department S.W.A.T. team. On the morning of August 2, 2016 Sergeant Strosnider briefed DEU members Lieutenant Hoffman and Officers Garcia, Harrison, Weiss and Derek Theurer with the information known about Padilla.

Later that morning, Sergeant Strosnider and the DEU team positioned themselves at the Best Western Hotel. Sergeant Strosnider was in an unmarked vehicle; Lieutenant Hoffman was in a marked Ford Explorer; Officer Garcia was driving a black-and-white patrol car with Officer Harrison in the passenger seat; and Officer Theurer was driving another black-and-white patrol car with Officer Weiss as his passenger.

The team observed Padilla pull into the parking lot in a black Yukon. Lieutenant Hoffman and Officers Garcia and Theurer drove into the lot behind him and positioned their cars so as to prevent Padilla’s vehicle from exiting the lot.

Padilla briefly pulled into a parking spot but, after spotting the police cars, quickly reversed and headed directly towards the police cars at top speed. As Padilla's car rapidly approached Officers Garcia and Harrison's car, Officer Harrison shot his rifle at Padilla through Padilla's windshield. Officer Weiss also fired his rifle at Padilla. Approximately five to 10 feet from Officer Garcia and Harrison's car, Padilla veered to the right towards Lieutenant Hoffman's car, still accelerating. It did not appear to the officers that there was any gap between the cars through which Padilla could escape. Officer Garcia exited the car and also began shooting his handgun at Padilla in an attempt to stop Padilla from hitting Lieutenant Hoffman's vehicle. Lieutenant Hoffman began firing his handgun at Padilla and almost simultaneously Padilla's Yukon violently crashed into Lieutenant Hoffman's parked vehicle, sending it backwards and causing its airbags to deploy. Data obtained from the Yukon showed it was traveling at 25 miles per hour just prior to the collision. Defense expert Ronald Guzek testified that 1.598 seconds elapsed between the first shot fired by any officer and the deployment of the airbag.

After the collision, Padilla appeared to be reaching towards the center of the Yukon's dashboard. Lieutenant Hoffman continued firing at Padilla through the windshield. Officer Garcia gave Padilla commands to put his hands up, and after some delay, he did so. The officers pulled him out of the Yukon and arrested him.

Paramedics transported Padilla to the hospital with multiple bullet wounds, one of which left him a paraplegic. An emergency room physician testified that the paralysis would have occurred instantly upon Padilla sustaining a gunshot wound to

his spine. Lieutenant Hoffman suffered a neck injury from the collision.

A search of the Yukon revealed a hidden compartment behind the navigation screen in the dashboard. A loaded semi-automatic handgun was found in the compartment.

The prosecution played Lieutenant Hoffman's body camera footage of the incident for the jury, as well as surveillance footage from a nearby establishment. None of the other officers had their body cameras activated.

The prosecution sought to demonstrate that Padilla intentionally used his car as a weapon against Officers Garcia and Harrison and Lieutenant Hoffman as he attempted to evade them. The prosecution asserted Padilla could not reasonably have believed there was any gap between the police cars big enough to navigate his Yukon through. The defense argued Padilla was merely trying to escape, and that after the trigger-happy officers shot him and left him paralyzed, he had no control over his legs and unintentionally crashed into Lieutenant Hoffman's vehicle.

The jury acquitted Padilla of count 1 (regarding the Manor Motel incident) and found him guilty of counts 2 through 4 (regarding the Best Western incident). Following a court trial, the court found true the prior prison term allegations.

The court sentenced Padilla to a total of six years in prison, consisting of the upper term of five years on count 2, with concurrent five-year sentences for counts 3 and 4, and a consecutive term of one year pursuant to section 667.5, subdivision (b), for a single prison prior. The court dismissed the second prison prior pursuant to section 1385.

The court imposed the minimum restitution fine of \$300 pursuant to section 1202.4, subdivision (b), and imposed and suspended a corresponding \$300 parole revocation fine pursuant to section 1202.45. The court also imposed a court operations assessment of \$40 for each of the three counts (§ 1465.8) and a criminal conviction assessment of \$30 for each count (Gov. Code, § 70373). Padilla did not object to the imposition of these fines and assessments or request a hearing to determine whether he had the ability to pay them.

Padilla timely filed a notice of appeal.

DISCUSSION

I. Pitchess *Motions*

A. *Denial of Pitchess Request for Officers Garcia, Harrison and Weiss*

Padilla filed a *Pitchess* motion under Evidence Code section 1043 for disclosure of citizen complaints against Sergeant Strosnider, who was present at both the July 21, 2016 incident at the Manor Motel and the August 2, 2016 incident at the Best Western Hotel. Padilla also sought discovery of complaints against Officer Spry, the officer directly involved in the Manor Motel incident, as well as against four of the officers involved in the Best Western incident, namely Lieutenant Hoffman and Officers Garcia, Harrison, and Weiss. Padilla sought information about any complaints against any of these officers based on excessive force, fabrication, and falsification of police reports, among other subjects.

The trial court granted the motion as to discovery of complaints of “fabrication, falsification of reports, or excessive force” by Sergeant Strosnider, Lieutenant Hoffman, and

Officer Spry, but denied the motion entirely as to Officers Garcia, Harrison and Weiss. The court gave no explanation for treating the motion as to Officers Garcia, Harrison, and Weiss differently. Padilla contends his motion as to these three officers met the threshold showing of good cause and materiality and thus should have been granted as to complaints of fabrication, falsification of reports, and excessive force. We agree and conclude the trial court abused its discretion in denying the motion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827 [trial court ruling on *Pitchess* motion reviewed for abuse of discretion]; *Uybungco v. Superior Court* (2008) 163 Cal.App.4th 1043, 1049.)

1. *Legal Principles*

Peace officer personnel records are generally confidential. (*People v. Superior Court (Johnson)* (2015) 61 Cal.4th 696, 710.) However, the California Supreme Court's decision in *Pitchess* "established that a criminal defendant could 'compel discovery' of certain relevant information in the personnel files of police officers by making 'general allegations which establish some cause for discovery' of that information and by showing how it would support a defense to the charge against him." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019 (*Warrick*).) "In 1978, the California Legislature codified the holding of *Pitchess* by enacting . . . sections 832.7 and 832.8, as well as Evidence Code sections 1043 through 1045." (*Id.* at p. 1019.) "Traditionally, *Pitchess* motions seek information about past complaints by third parties of excessive force, violence, dishonesty, or the filing of false police reports." (*Johnson, supra*, 61 Cal.4th at p. 710.)

To initiate discovery of a police officer's personnel files, "the defendant must file a motion supported by affidavits showing

‘good cause for the discovery,’ first by demonstrating the materiality of the information to the pending litigation, and second by ‘stating upon reasonable belief’ that the police agency has the records or information at issue. ([Evid. Code,] § 1043, subd. (b)(3).)” (*Warrick, supra*, 35 Cal.4th at p. 1019.) Defense counsel must submit a declaration proposing a defense to the pending charges and articulating how the discovery sought may lead to relevant evidence or may itself be admissible evidence that would support the proposed defense. (*Id.* at p. 1024.) “Counsel’s affidavit must also describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.” (*Id.* at pp. 1024-1025.) The trial court considers whether the affidavit, and any other documents proffered such as police reports and witness statements, “suffice to ‘establish a plausible factual foundation’ for the alleged officer misconduct and to ‘articulate a valid theory as to how the information sought might be admissible’ at trial.” (*Id.* at p. 1025.) This showing of good cause is a “‘relatively low threshold for discovery.’” (*Id.* at p. 1019; accord, *Uybungco v. Superior Court, supra*, 163 Cal.App.4th at p. 1048.)

In *People v. Hustead* (1999) 74 Cal.App.4th 410, 416, cited with approval in *Warrick, supra*, 35 Cal.4th at page 1025, the defendant, charged with felony evasion of arrest after a high-speed vehicle chase, brought a *Pitchess* motion to discover whether the pursuing officer had a “history of misstating or fabricating facts” in his police reports. Defense counsel’s declaration denied that the defendant had driven in the manner described by the pursuing officer. The appellate court found good cause for an in camera inspection of the officer’s files where

defense counsel's declaration was sufficient to "establish a plausible factual foundation" for the defendant's contention that the police report fabricated the defendant's "alleged dangerous driving maneuvers." (*Hustead*, at p. 417; see also *Warrick*, *supra*, 35 Cal.4th at pp. 1026-1027 [where defendant accused of possessing and discarding cocaine asserted factual scenario in *Pitchess* motion that the officers mistook defendant for the person who actually discarded the cocaine and falsely accused him of having done so, and defendant "outlined a defense raising the issue of the practice of the arresting officers to make false arrests, plant evidence, commit perjury, and falsify police reports or probable cause," good cause existed for discovery of complaints for dishonesty in officers' files]; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 78-78 [defendant demonstrated the materiality of information sought regarding prior use of excessive force by arresting officers where he alleged they used excessive force in arresting him and intended to assert such excessive force as a defense to the charge of resisting arrest]; *Uybungco v. Superior Court*, *supra*, 163 Cal.App.4th at pp. 1049-1050 [defendant's declaration was sufficient to establish good cause for review of officers' files to identify previous complaints of false reports where defendant stated he did not resist the police and police reports stating he did were false].)

2. *Documents Supporting Pitchess Motion*

Accompanying Padilla's *Pitchess* motion was: (1) a declaration from defense counsel providing Padilla's versions of the Manor Motel incident and the Best Western incident; (2) the Redondo Beach police report from the Manor Motel incident; (3) the Los Angeles County Sheriff's report regarding the Best Western incident; (4) transcripts of the Los Angeles County

Sheriff's Department's interviews of the officers involved in the Best Western incident; and (5) the preliminary hearing transcript.

a. Officer interviews

Because the incident at the Best Western included an officer-involved shooting, detectives from the Homicide Bureau of the Los Angeles County Sheriff's Department took command of the crime scene and investigation. The day after the incident, they conducted individual interviews of all the Redondo Beach police officers involved.

Sergeant Strosnider told the detectives that as of August 2, 2016 the Redondo Beach police had been investigating Padilla for several months for crimes including counterfeiting, identity and vehicle theft, credit card and rental card fraud, and weapons possession. Padilla was known to be a "major counterfeiter in Southern California." In addition, Padilla had recently "attempted to run over or hit" another police officer (Officer Spry) on July 21, 2016 at the Manor Motel while Sergeant Strosnider and Officer Spry were conducting a probation search of another individual's room at the motel.

Sergeant Strosnider planned an operation to apprehend Padilla at the Best Western on August 2. On the morning of August 2, he briefed DEU members Lieutenant Hoffman and Officers Weiss, Theurer, Garcia and Harrison. Sergeant Strosnider conveyed information from informants that Padilla was known to carry firearms and had said he was "not gonna go down without a fight" and he would "shoot it out" with the police if they tried to stop him.

Sergeant Strosnider had the DEU team members position themselves in their marked patrol cars near the parking lot of the

Best Western. When a black Yukon pulled into the lot, Sergeant Strosnider was able to identify that Padilla was driving the vehicle. The three black-and-white police cars pulled into the lot behind him.

One of the officers radioed the team, “[W]e have him. It looks like he’s parking or making a U-turn.” Padilla reversed the Yukon and pointed it to face the officers who had pulled in behind him. He then appeared to accelerate the Yukon towards them. Sergeant Strosnider heard a collision as the Yukon slammed into one of the patrol vehicles. When Sergeant Strosnider saw Padilla accelerate, he believed Padilla was trying to “intentionally use his vehicle as a weapon to escape.” Sergeant Strosnider saw rounds being fired through Padilla’s front windshield. After multiple rounds were fired, several officers approached the Yukon, removed Padilla, and handcuffed him.

In their own individual interviews, Officers Theurer, Weiss, Garcia and Harrison as well as Lieutenant Hoffman corroborated Sergeant Strosnider’s description of the briefing they received from him and the incident at the Best Western. Each provided his perspective on how the incident unfolded.

Officer Theurer indicated his senses were heightened and he was “a little worried” while he and his partner Officer Weiss waited for Padilla to arrive at the hotel, given what he had learned from Sergeant Strosnider about Padilla’s dangerous propensities. He observed Padilla drive into the lot and pull into a parking spot, only to quickly reverse, causing his car’s tires to screech. Padilla put the Yukon into “drive,” pointed it at Officers Theurer and Weiss’s vehicle, and appeared to “floor” his car in their direction, with the tires screeching. Officer Theurer believed Padilla was going to ram his car, but Padilla then cut

south, still driving at top speed. Padilla was now heading towards either Officers Garcia and Harrison's car, or Lieutenant Hoffman's vehicle, and he did not slow down at all, even though there was no room to get by the police cars. Officer Weiss exited the car and began shooting at Padilla. Officer Theurer was "definitely in fear" for his partners as Padilla flew towards them "in a giant Yukon at a high rate of speed." He got out of the car with his weapon drawn and then realized the Yukon had crashed into Lieutenant Hoffman's car.

Officer Weiss similarly told the detectives that after Padilla pulled into a parking space at the hotel, "the vehicle quickly goes into reverse and starts backing up at a high rate of speed." Officer Weiss then heard the motor revving and the tires screeching as Padilla accelerated forward, and Officer Weiss believed Padilla "had seen us and . . . he was beginning his flight." Officer Weiss got out of his car and went behind Officers Garcia and Harrison's car, but now Padilla's car was heading directly for them, speeding up. Officer Weiss was afraid Padilla was going to injure Officers Garcia and Harrison with his much larger vehicle, which was "moving as fast as the car could move." As Padilla drew closer, Officer Weiss also feared for his own safety. That is when he began to fire. Padilla swerved and barely missed Officers Garcia and Harrison's car and headed directly towards Lieutenant Hoffman's car at a high rate of speed. Believing Padilla was going to ram Lieutenant Hoffman, Officer Weiss continued to fire. Padilla's car violently collided with Lieutenant Hoffman's.

Officer Garcia described Padilla pulling into the motel parking spot, then looking in Officer Garcia's direction and locking eyes with him. Padilla got a panicked look on his face

and quickly put his car in reverse, squealing the tires. The tires screeched again as Padilla moved the car forward, and “[n]ow I know for a fact . . . that he’s coming towards us and he’s gonna try to pretty much ram our car.” Officer Garcia heard Officer Harrison say, “If he gets closer, I’m gonna’—and then that’s when I hear . . . the rounds go off” as Officer Harrison shot at Padilla through the windshield. Padilla maneuvered around their vehicle and headed directly towards Lieutenant Hoffman’s car at a high rate of speed. Officer Garcia exited his car and began shooting at Padilla, believing he was going to ram Lieutenant Hoffman, which he did.

Officer Harrison similarly recounted Padilla’s quick reversal and that he then threw the car into “drive” and accelerated so quickly that the front of the car was rising up. Officer Harrison believed Padilla was “trying to run straight through us to . . . seriously injure or kill us.” He began telling Officer Garcia, “I’m going to shoot,” but did not even have a chance to finish his sentence because Padilla was closing the distance between them so quickly. He began shooting at Padilla from his passenger’s seat. Padilla then swerved to his left and narrowly missed their car, “and now I see that he’s going straight towards the lieutenant, still accelerating,” leading to a “pretty violent collision.”

Lieutenant Hoffman described the team’s “plan to attempt to pin [Padilla’s] vehicle in” to prevent him from escaping the parking lot. Like the other officers, he described Padilla’s reversal out of the parking spot at a high rate of speed and then his rapid acceleration forward towards Officer Garcia and Harrison’s vehicle. “[A]s he was coming towards . . . Officer Garcia and Officer Harrison’s vehicle, he swerved sharply to the

south and was now basically head on with my vehicle.” Realizing he was in an “incredibly dangerous spot,” Lieutenant Hoffman raised his rifle and fired at Padilla through his own windshield as the vehicle was rapidly approaching and was within one car length of him. After the “incredibly violent” collision that jolted his body, Lieutenant Hoffman exited the car. From his position outside the driver’s door of Padilla’s vehicle, he saw Padilla “leaning over towards the right hand side of the vehicle, and down, and I thought that he had a gun and was going to shoot me.” Lieutenant Hoffman fired a round at Padilla, and when Padilla was still making furtive movements, fired again, until the other officers gave commands with which Padilla complied.

b. *Declaration of defense counsel*

According to defense counsel’s declaration, Padilla had explained that on the date of the Manor Motel incident, Padilla drove two others to the Manor Motel. After he parked, “he heard someone yell at him to get out of there.” He “backed up as police came running toward his car, yelling at him to stop.” He contended no one was near his car or in danger while he was backing up, and he left the scene to avoid police contact. According to Padilla, Officer Spry falsely claimed Padilla almost hit him as he reversed the car and Sergeant Strosnider backed up Officer Spry’s false claim in falsified police reports and testimony.

As for the August 2, 2016 incident at the Best Western Hotel, Padilla asserted he was simply trying to evade the police officers by driving through the parking lot. He contended the officers’ vehicles were stopped in such a fashion that he was able to get by them by staying to the left. “He was driving at a normal rate of speed past the first [police] vehicle when gunfire erupted toward his car” and then “round after round ripped into his

vehicle and he felt bullets striking his body,” causing him to lose control of his legs and then crash into a parked car and then a police car.

According to Padilla’s version of events, “Officers Hoffman, Garcia, Weiss, and Harrison fired numerous rounds at [Padilla] simply to prevent his escape.” Padilla contended the officers fabricated stories that they fired at him in self-defense as “part of a pre-determined plan to cover their excessive use of force.” He alleged Lieutenant Hoffman and Officers Garcia, Weiss and Harrison “engaged in acts of excessive force, falsified police reports, and withheld exculpatory information,” and that Sergeant Strosnider, Lieutenant Hoffman, and Officer Garcia had testified falsely at the preliminary hearing regarding this incident.²

Padilla’s defense counsel asserted that “[o]ne of the defenses in this case may be that the officers conspired to use excessive force in effectuating an arrest and used excessive force to detain and arrest him, falsified reports and during interviews, withheld exculpatory information, and were dishonest in the investigation.” The defense would use prior complaints about the officers to locate witnesses to testify as to the officers’ character traits and propensities for the type of conduct they demonstrated in Padilla’s case, as well as to cross-examine and impeach the officers.

² At the preliminary hearing, Sergeant Strosnider, Lieutenant Hoffman, and Officer Garcia testified consistently with their statements to the homicide detectives the day after the Best Western incident.

3. *Analysis*

The declaration provided by Padilla's counsel met the low threshold necessary to establish good cause for in camera review of the personnel files of Officers Garcia, Harrison and Weiss. The declaration set forth a specific and plausible factual scenario under which Padilla was merely attempting to escape from the Best Western parking lot, rather than to assault the officers using his vehicle. He contends the only reason he crashed into Lieutenant Hoffman's car was that the officers shot him and caused him to become instantly paralyzed from the waist down, leading him to lose control of the car.

Under Padilla's theory, Officers Garcia, Harrison and Weiss conspired with Sergeant Strosnider and Lieutenant Hoffman and the other officers present at the Best Western to falsely claim that they acted in self-defense or in defense of their fellow officers by shooting at Padilla because he aimed his car at Officers Garcia and Harrison's vehicle and then at Lieutenant Hoffman's vehicle. According to Padilla, these officers' false claims were designed to hide their use of excessive force in shooting at Padilla when he was merely attempting to escape.

This theory, if proven, would support a defense to the assault with a deadly weapon charges involving assaults on Lieutenant Hoffman and Officers Garcia and Harrison. Complaints regarding excessive force, fabrication, or falsification of reports by these officers would be relevant to proving such a defense. Therefore, good cause existed to grant the *Pitchess* motion as to these officers, just as the trial court found good cause existed to conduct an in camera review of the files of Sergeant Strosnider and Lieutenant Hoffman.

The parties agree the remedy is to conditionally reverse and remand for the trial court to conduct an in camera review of the records of Officers Garcia, Harrison and Weiss for any complaints of fabrication, falsification of reports, and excessive force. (See *People v. Gaines* (2009) 46 Cal.4th 172, 180 [“the proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery and has not reviewed the requested records in camera is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand”].) After conducting the in camera review, the trial court may determine that the requested personnel records contain no relevant information. In that instance, the trial court is directed to reinstate the judgment. If the trial court determines that relevant information exists and should be disclosed, the trial court must order disclosure. (See *Warrick, supra*, 35 Cal.4th at p. 1019 [“If the trial court finds good cause for the discovery, it reviews the pertinent documents in chambers and discloses only that information falling within the statutorily defined standards of relevance”].) After such disclosure to the defense, the court must allow Padilla an opportunity to demonstrate prejudice and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. (*Gaines*, at p. 181.)

B. In Camera Review of Lieutenant Hoffman’s File

The trial court granted Padilla’s motion for *Pitchess* discovery and conducted an in camera hearing as to Lieutenant Hoffman’s file. Padilla asks this court to conduct its own in camera review of the sealed records to determine if there was additional discoverable information relating to Lieutenant Hoffman that should have been disclosed. Pursuant to this

request, we have reviewed the sealed reporter's transcript of the in camera hearing and conclude that the trial court fully complied with its duties. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1229-1232.)

II. *Trial Court's Response to Jury Question*

Padilla contends the court abused its discretion by failing to clarify its jury instructions in response to a jury question demonstrating juror confusion about the law to be applied. However, his trial counsel forfeited any objection.

A. *Court's Colloquy With Counsel and the Court's Response to Jury Question*

On the morning of the second day of deliberations, the court addressed a question submitted by the jury by directing them to reread the jury instructions on assault. Soon thereafter, the jury signaled they had another question, and the court reviewed the written jury question with counsel outside the presence of the jury. The question read: "My question if I don't believe Mr. Padilla was using his vehicle to endanger Garcia and Harrison and was trying to flee—by way of evidence I heard and listened to. I cannot agree on Guilty. I am being questioned on example of bat theory,^[3] 372 [l]ast sentence speaks to me.^[4] I

³ Padilla asserts the juror must have been referring to defense counsel's explanation of the crime of assault in his closing argument, when counsel explained to the jury, "If I have a bat and I try to hit somebody with a bat, that is an assault. If I try to hit them and I make contact, it is an assault. If I try to hit them and I miss because I am a bad aim, that is an assault." After explaining that there can be an assault where the actor does not intend to hurt anyone, such as when someone throws a rock off a bridge without specifically intending to hit anyone, counsel explained, "[G]enerally in the typical case where you have a bat

believe I first have to believe Mr. Padilla was intending to use vehicle to harm Garcia/Harrison and I don't. Am I interpreting the law incorrect?"

The court stated to counsel, "They're asking me to tell them what to think, and I can't do that." Counsel for Padilla responded, "It sounds like yes to me." The court replied, "We're not going to give them a yes or a no." "What my intention is is to bring out the jury in total and address it entirely with all of them and say: I can't answer you on this because you're asking me to give you an answer to your decision that I cannot do. Nobody can do that. That's your job."

The prosecution suggested the court remind the jury of CALCRIM No. 200, which instructed the jury that they must decide what happened based on the evidence at trial and must follow the law even if they disagree with it. Defense counsel stated there was no need to point out any particular instruction other than potentially the reasonable doubt instruction, because it sounded like one or more of the jurors was not convinced by the

or you are driving a car . . . it is a willful attempt to run him over, to hit him with the bat and that is what you have to find." In the prosecutor's rebuttal, he asserted defense counsel had incorrectly implied that the prosecution needed to prove Padilla tried to hit someone with a car. The prosecutor referred the jury to the pattern instruction they were being given for the offense of assault with a deadly weapon on a peace officer, which provided that "[i]t is not required that [the [defendant] intend to . . . hurt someone" and "[t]he People are not required to prove that the defendant actually intended to use force against someone when he acted."

⁴ The juror apparently was referring to the last sentence of CALCRIM No. 372, which provides that "evidence that the defendant fled or tried to flee cannot prove guilt by itself."

evidence. Defense counsel further stated, “I think you could answer this by saying, you are the judges of the facts. I cannot answer this question, and refer them to the jury instruction on reasonable doubt.” “I think that’s the only answer, if any, the Court should give. Other than that, it’s not a question. It [is] just kind of a rambling discourse by potentially one of our jurors.”

The court announced its plan to bring the jurors out and tell them to reread the instructions, including CALCRIM Nos. 200 [“Duties of Judge and Jury”], 220 [“Reasonable Doubt”], 222 [“Evidence”], and 226 [“Witnesses”], and remind them they were the ones making the decision and the judge could not help them with that. Neither counsel objected to the court’s final plan for responding to the juror question. The court instructed the jury accordingly.

The jury resumed deliberations and after approximately 15 minutes communicated that they had reached a verdict as to counts 1 and 2 but were unable to reach a unanimous verdict as to counts 3 and 4 (involving Officers Garcia and Harrison) due to one hold-out juror on each of those counts. The court instructed the jury to continue its deliberations and to engage in reverse role-playing to better understand each other’s positions. Deliberations again resumed, and 10 minutes later the jury reached a verdict. The jury found Padilla not guilty on count 1 (assault upon Officer Spry) and guilty on counts 2, 3 and 4 (assaults on Lieutenant Hoffman, Officer Garcia and Officer Harrison, respectively).

B. Padilla’s Claim of Instructional Error

Padilla contends “the court failed to properly answer the jury’s question by answering with a simple ‘yes’ and/or by clarifying as to the intent element that in order for the jury to

find [Padilla] guilty of the charged crimes, the prosecution had to prove inter alia that [Padilla] intended to commit an act likely to result in physical force on an officer.” He contends that the court “confused and misled the jury” by referring the jury back to the general instructions about the jury’s duties in considering the evidence.

Padilla relies on section 1138, which “requires the trial court to provide the jury with ‘any desired information ‘on any point of law arising in the case,’” and thereby creates a “‘mandatory’” duty to clear up any instructional confusion expressed by the jury.” (*People v. Loza* (2012) 207 Cal.App.4th 332, 355 (*Loza*) [where court had misinstructed jury, and “it was clear from the jury’s questions that the instructions that the court had already given had left the jurors confused, it was not enough for the court to inform the jurors, in response to their specific inquiry, that they must rely on the very instructions that had confused them”]; see *People v. Beardslee* (1991) 53 Cal.3d 68, 97 [“The court has a primary duty to help the jury understand the legal principles it is asked to apply”]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212, superseded by statute on another ground, as stated in *In re Steele* (2004) 32 Cal.4th 682, 691; § 1138 [“After the jury have retired for deliberation, if . . . they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given . . .”].)

“This does not mean the court must always elaborate on the standard instructions. Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are

sufficient to satisfy the jury’s request for information. [Citation.] Indeed, comments diverging from the standard are often risky.” (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97; accord *People v. Yarbrough* (2008) 169 Cal.App.4th 303, 317 [“section 1138 does not demand elaboration upon the standard instructions by the trial court when the jury expresses confusion, but rather directs the court to ‘consider how it can best aid the jury and decide whether further explanation is desirable, or whether the reiteration of previously given instructions will suffice’”]; *People v. Moore* (1996) 44 Cal.App.4th 1323, 1331.)⁵

Further, “[a] violation of section 1138 does not warrant reversal unless prejudice is shown.” (*People v. Beardslee*, *supra*, 53 Cal.3d at p. 97.) Padilla focuses on the fact that at the time the jury gave its second question to the court, it was deadlocked 11 to one on counts 3 and 4. He contends the court’s failure to properly respond to the jury question prejudiced him “because it is at least reasonably probable” that had the court answered the jury’s question properly, “the holdout juror would have continued to vote not guilty.”

C. *Padilla Forfeited His Claim of Error*

The Attorney General contends Padilla forfeited his claim of instructional error below, and we agree. Defense counsel took the position that the note from the juror was not a real question and was more a “rambling discourse” by one of the jurors who was not convinced of Padilla’s guilt. As such, counsel suggested the court tell the jury it could not answer their question and instead remind them of their obligation to decide the facts and

⁵ Padilla does not contend that the pattern instructions for assault with a deadly weapon upon a peace officer misstate the intent requirement or require clarification.

refer them to the jury instruction on reasonable doubt. The trial court adopted this suggestion, while also instructing the jurors to reread several other general instructions. Any error was essentially invited by defense counsel, and Padilla may not complain on appeal about the trial court's response to the juror question. (See *People v. Payton* (1992) 3 Cal.4th 1050, 1068 [where court granted defense counsel's request that it not respond to juror note, complaint regarding court's response to jury question was waived on appeal]; *Loza, supra*, 207 Cal.App.4th at p. 350 ["With respect to the trial court's response to the jury's questions, [defense] attorney agreed with the response that the court gave [Defendant] has thus also forfeited her contention that the trial court's response to the jury's questions on this point was erroneous"]; *People v. Thoi* (1989) 213 Cal.App.3d 689, 698 ["When the court expressed an inclination to leave the [jury] questions unanswered, defense counsel launched into a lengthy speech supporting inaction by the court, and even suggested the jury should be admonished to rely on the instructions previously given. . . . Counsel's conduct either waived or invited any error by the court."].)

D. *No Ineffective Assistance of Counsel*

Padilla contends his trial counsel's failure to object to the trial court's response to the jury question constituted ineffective assistance of counsel. "An appellant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance resulted in prejudice. [Citations.] [¶] To establish prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different.”””
(*Loza, supra*, 207 Cal.App.4th at p. 350; see *People v. Vines* (2011)
51 Cal.4th 830, 869-870, overruled on other grounds by *People v.*
Hardy (2018) 5 Cal.5th 56, 104.)

““““Reviewing courts defer to counsel’s reasonable tactical
decisions in examining a claim of ineffective assistance of counsel
[citation], and there is a ‘strong presumption that counsel’s
conduct falls within the wide range of professional assistance.’”
[Citation.] “[W]e accord great deference to counsel’s tactical
decisions” [citation], and we have explained that “courts should
not second-guess reasonable, if difficult, tactical decisions in the
harsh light of hindsight” [citation]. “Tactical errors are generally
not deemed reversible, and counsel’s decisionmaking must be
evaluated in the context of the available facts.”””” (*Loza, supra*,
207 Cal.App.4th at p. 351; see *People v. Vines, supra*, 51 Cal.4th
at p. 876.)

In this case, defense counsel articulated his belief that the
juror who submitted the question was not convinced of Padilla’s
guilt. The question stated in part, “I believe I first have to
believe Mr. Padilla was intending to use the vehicle to harm
Garcia/Harrison and I don’t.” From this, counsel reasonably
could have concluded that the hold-out juror believed he had to
find Padilla specifically intended to use his car to harm Officers
Garcia and Harrison in order to find Padilla guilty of assaulting
them. If anything, this juror appeared to be applying a standard
that was too stringent, as assault does not require a specific
intent to harm someone or cause injury. (See *People v. Williams*
(2001) 26 Cal.4th 779, 785 [for assault crimes “[t]he pivotal
question is whether the defendant intended to commit an act
likely to result in such physical force, not whether he or she

intended a specific harm”].) That is likely why defense counsel was not keen to provide further education to the jury about the intent element of the crime of assault. Accordingly, it was a reasonable tactical decision on the part of defense counsel to not advocate for further clarifying instructions on the intent element. For the same reason, we conclude Padilla cannot show a reasonable probability that, but for his defense counsel’s failure to demand clarification of the intent standard for the offense of assault, the result of the trial on counts 3 and 4 would have been different.

III. *Padilla Is Entitled to a Hearing on His Ability To Pay the Assessments and Restitution Fine*

Padilla requests we remand the case for the trial court to conduct an ability to pay hearing in accordance with our opinion in *Dueñas, supra*, 30 Cal.App.5th 1157, because he was indigent at the time of sentencing. We agree Padilla should have an opportunity on remand to request a hearing and present evidence demonstrating his inability to pay the \$300 restitution fine the trial court imposed pursuant to section 1202.4, the \$90 in criminal conviction assessments imposed under Government Code section 70373, and the \$120 in court operations assessments imposed under section 1465.8.

In *Dueñas, supra*, 30 Cal.App.5th 1157, this court concluded “the assessment provisions of Government Code section 70373 and Penal Code section 1465.8, if imposed . . . upon indigent defendants without a determination that they have the present ability to pay violates due process under both the United States Constitution and the California Constitution.” (*Id.* at p. 1168.) Thus, we held the trial court must conduct an ability to pay hearing to ascertain a defendant’s present ability to pay

before it imposes these assessments. (*Ibid.*) Further, although section 1202.4, subdivision (c) bars consideration of a defendant's inability to pay when imposing a restitution fine unless the court is considering imposing more than the minimum fine required by statute, in light of the due process issues we held "the court must stay the execution of the fine until and unless the People demonstrate that the defendant has the ability to pay the fine." (*Dueñas*, at p. 1172.)

A. Padilla Did Not Forfeit His Right to an Ability To Pay Hearing

In its supplemental briefing, the Attorney General contends Padilla forfeited his objections to the trial court's imposition of the restitution fine and assessments because he failed to object to their imposition at sentencing. However, at the time Padilla was sentenced, *Dueñas* had not yet been decided. As we explained in *People v. Castellano* (2019) 33 Cal.App.5th 485, 489 (*Castellano*) in rejecting this forfeiture argument, "no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. . . . When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture." (See also *People v. Johnson* (2019) 35 Cal.App.5th 134, 137-138 [forfeiture doctrine did not apply because *Dueñas* holding was not reasonably foreseeable]; contra, *People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464 [defendant forfeited challenge by not objecting to the assessments and restitution fine at sentencing]; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153-1154 [same].) As in *Castellano*, we

decline to find Padilla forfeited his constitutional challenge to the imposition of the assessments and restitution fine.

B. Padilla Is Entitled to an Opportunity on Remand To Show He Lacked the Ability To Pay

The Attorney General contends Padilla's due process claim arising from the imposition of the assessments and restitution fine fails because the record does not establish that he would be unable to pay them. The Attorney General emphasizes that Padilla retained private counsel to represent him for the lengthy trial and at sentencing and argues the cost of Padilla's legal representation necessarily "greatly exceeds" the fine and assessments that were imposed. The Attorney General acknowledges that Padilla is now a paraplegic but argues "there was no evidence presented indicating that this prevents him from working in any capacity or prevents him from gaining any future earnings" in prison or upon his release.

Besides the information that Padilla retained private counsel for his trial proceedings and is now a 27-year-old paraplegic sentenced to a six-year prison term, the information in the record regarding Padilla's ability to pay at the time of sentencing is limited. The record is devoid of evidence regarding Padilla's financial assets at the time of sentencing or any other time. The probation report contains information that Padilla claimed he was employed as a gardener and was previously employed as a mechanic and in the fields of construction, sales and landscaping.

We could only speculate as to whether Padilla's permanent spinal injury will prevent him from earning prison wages or limit any gainful employment upon his release. Similarly, although Padilla's representation by private counsel tends to suggest he

had access to significant financial resources, we also would have to speculate as to whether he still had such resources at the time of sentencing. Padilla must be afforded the opportunity to have a determination of his ability to pay made upon a fuller record by the trial court, where the burden will be upon Padilla to establish his indigence. (See *Castellano, supra*, 33 Cal.App.5th at p. 490 “[A] defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court”].)

We reject the Attorney General’s additional contention Padilla has not shown a due process violation because he has not demonstrated adverse consequences from imposition of the fines and assessments. “[T]he defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections.” (*Castellano, supra*, 33 Cal.App.5th at p. 490.)

As Padilla’s conviction and sentence are not yet final, we remand the matter to the trial court so that he may request a hearing and present evidence demonstrating his inability to pay the fine and assessments imposed by the trial court. “If the trial court determines [Padilla] is unable to pay, the . . . assessments cannot be imposed; and execution of any restitution fine imposed must be stayed until such time as the People can show that [Padilla’s] ability to pay has been restored.” (*Castellano, supra*, 33 Cal.App.5th at p. 490.)⁶

⁶ Assuming Padilla demonstrates he is unable to pay such that the restitution fine imposed under section 1202.4 is stayed, the concomitant parole revocation fine imposed and suspended

DISPOSITION

The matter is conditionally reversed and remanded for the trial court to conduct an in camera review of the records of Officers Garcia, Harrison and Weiss. After conducting the in camera review, if the trial court determines the requested personnel records contain no relevant information, the trial court is directed to reinstate the judgment. If the trial court determines that relevant information exists and should be disclosed, it must order disclosure, allow Padilla an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. On remand, the trial court is also directed to afford Padilla the opportunity to request a hearing on his ability to pay the court facilities assessments (Gov. Code, § 70373), court operations assessments (§ 1465.8) and

pursuant to section 1202.45 would also be stayed until such time as the People demonstrate Padilla's ability to pay has been restored.

restitution fine (§ 1202.4). If the court determines he is unable to pay, the assessments may not be imposed, and the court must stay the execution of the restitution fine. The judgment is otherwise affirmed.

STONE, J.*

We concur:

PERLUSS, P. J.

ZELON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.